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Has Uncertainty been Ascertained? – Delineating the Scope of Security Exceptions Provisions in the WTO Agreements and the Free Trade Agreements
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HAS UNCERTAINTY BEEN ASCERTAINED? – DELINEATING THE SCOPE OF SECURITY EXCEPTIONS PROVISIONS IN THE WTO AGREEMENTS AND THE FREE TRADE AGREEMENTS

APOORVA SINGH VISHNOI* & RISHABHA MEENA**

In the GATT era, the GATT Contracting Parties sought to justify their measures under security exceptions, but these exceptions were never interpreted in a dispute before a GATT panel. Consequentially, there was not adequate guidance concerning the interpretation of the security exceptions provisions. However, with the recent Panel Reports in the WTO disputes Russia – Traffic in Transit and Saudi Arabia – IPRs, the panel interpreted the security exceptions provisions for the first time. This will have a lasting effect on the WTO dispute settlements mechanism. But apart from the WTO agreements, these rulings will also have implications on the interpretation of security exceptions provisions incorporated in the FTAs entered into by the WTO Members. In the FTAs, the Members have adopted distinct approaches to the WTO security exceptions and modified them through the addition of new grounds for their invocation or making stipulations as to their self-judging nature. Similar trends have been followed in the Indian FTAs as well. But, while more and more FTAs incorporate language divergent from the WTO provisions to address issues concerning the grounds for their invocation and justiciability, there is little understanding of how and why this divergence is occurring. The recent Panel Reports are also going to affect this trend of divergence. Against this background, this article assesses the debate concerning security exceptions and the implication of the recent Panel Reports on them, specifically the WTO dispute of Saudi Arabia – IPRs. Further, the article analyses the approaches towards security exception

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provisions across FTAs with a specific emphasis on the Indian FTAs. Finally, the Article concludes by identifying the way ahead.

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I. INTRODUCTION

The security exceptions in the World Trade Organization (WTO) covered agreements are premised on the principles of *necessitas non habet legem* (necessity knows no law) and the WTO Members' right to self-preservation.[1] These security exceptions encapsulate cardinal goals that provide policy space to the WTO Members to pursue their security interests as long as the measures are logical,

[1] *See generally*, James A Green, *Self-Preservation*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., (2009); Military and Paramilitary Activities in and Against Nicaragua *(Nicar./U.S.)*, Merits, Judgment, 1986 I.C.J. Rep. 14, ¶¶102-103; U.N. Charter art. 51.

reasonable and coherent.[2] Consequentially, these exceptions cannot be invoked *sans limitations*.[3] Nonetheless, the exact scope of the security exceptions provisions was a matter of debate and had not been brought before a General Agreement on Tariffs and Trade (GATT) Panel or a WTO Panel until recently. Hence, there was no definitive guidance on the interpretation or justiciability of these provisions.

This lack of an exact scope was vexing. From a legal perspective, exceptions are different from rules in multiple ways. For instance, the initial burden to justify the invocation of an exception is on the respondent.[4] Further, the provisions containing exceptions are subject to strict interpretation as evident from the fact that only few disputes ended with the successful invocation of the general exceptions.[5] Thus, it is of paramount importance to interpret both general and security exceptions in a manner that ensures certainty about their scope and a balance between the obligations and the policy space of the WTO Members. Ensuring this certainty and balance becomes more challenging when the measure is based on security exceptions for which the applicable guiding principles of interpretation are still under intense debate.

With the recent Panel Reports in the WTO disputes *Russia – Traffic in Transit* and *Saudi Arabia – IPRs*, various aspects of the security exceptions, specifically, their self-judging nature and the interpretation of "emergency in international relations" and the chapeau, were addressed for the first time. The interpretation of the security exceptions in these Reports is still being contested by some,[6] but one thing

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[2] Asif H. Qureshi, *Interpreting Exceptions in the WTO Agreement: Lessons from the New Haven School*, 22 ASIA PAC. L. REV. 3, 4 (2014).

[3] *See generally*, Thomas Cottier et al., *The Principle of Proportionality in International Law* (Nat'l Ctr. of Competence in Research Trade Reg., Working Paper No. 2012/38, 2002).

[4] *Burden of Proof, Legal issues arising in WTO dispute settlement proceedings,* WORLD TRADE ORGANISATON, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s6p1_e.htm.

[5] *See* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶192(f), WTO Doc., WT/DS135/AB/R, DSR 2001:VII (adopted Apr. 5, 2001); the invocation of Article XX(b) of the GATT, 1994 was allowed. *See* Panel Report*, Russia – Measures Concerning Traffic in Transit,* ¶8.1(d), WTO Doc. WT/DS512/R *and* WT/DS512/R/Add.1 (adopted Apr. 26, 2019) [hereinafter Russia – Traffic in Transit]; the invocation of the Article XXI(b)(iii) was allowed. *See* Panel Report, *Saudi Arabia – Intellectual Property Rights,* ¶8.1(c), WTO Doc. WT/DS567/R (adopted Jun. 16, 2020) [hereinafter Saudi Arabia – IPRs]; the panel allowed the invocation of Article 73(b)(iii) for the measures preventing access to Saudi legal counsel to enforce its intellectual property rights through civil enforcement procedures before Saudi courts and tribunals.

[6] *See generally*, Simon Lester & Huang Zhu, *Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, Policy Analysis No. 874, Cato Institute (Jun. 25, 2019), https://www.cato.org/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale-restricting-trade; Benton Heath, *Guest Post: Trade, Security and*

is certain: the Panel Reports will have long-lasting implications on the WTO dispute settlement.

Additionally, the WTO agreements are not the only trade agreements with security exceptions that are likely to be affected by the Panel Reports. The security exceptions are also a part of the Free Trade Agreements (FTAs) entered into by the WTO Members. In these FTAs, the Members have taken different approaches to the security exceptions and built on those present in the WTO agreements, for instance, by adding new grounds for invocation of the exceptions or making declaration as to the self-judging nature of such exceptions.[7] The security exceptions in the Indian FTAs have also generally followed such trends of partial modifications. Yet, while many of the Indian FTAs and non-Indian FTAs have diverged from the WTO language to address issues of justiciability and grounds of invocation even before the aforementioned WTO Reports, the phenomenon remains understudied.

Against this background, this Article delves into the debate concerning security exceptions and the impact of the new Panel Reports on them, specifically the Reports in the WTO disputes of *Russia – Traffic in Transit* and *Saudi Arabia – IPRs* in Parts II and III respectively. Further, Part IV of the Article assesses the multitude of approaches towards security exception provisions adopted in the FTAs of the world as well as India. It identifies the dissimilarities in these exceptions and the security exceptions in the WTO agreements, and examines the wider context and the implications of these dissimilarities, especially in the aftermath of the Panel Reports. Part V concludes the Article by identifying the way ahead for India and other WTO Members in their approach towards security exceptions in the FTA in light of the two WTO Panel Reports.

II. SECURITY EXCEPTIONS AND WTO: THE DEBATE SO FAR AT THE MULTILATERAL FORUM

The continuous existence of the State and its sovereignty are always at a higher pedestal than the economic benefits emerging out of the international trade obligations.[8] The security exceptions were incorporated in the WTO agreements as

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Stewardship (Part IV): A Variable Framework for Security Governance, INT'L ECON. L. POL'Y BLOG (May 8, 2019), https://worldtradelaw.typepad.com/ielpblog/2019/05/guest-post-trade-security-and-stewardship-part-iv-a-variable-framework-for-security-governance.html; *See generally*, Viktoriia Lapa, *The WTO Panel Report in Russia – Traffic in Transit: Cutting the Gordian Knot of the GATT Security Exception?,* 69 QUESTIONS INT'L L., ZOOM-IN 5-27 (2020).

[7] *See infra,* Part 4.

[8] JOHN HOWARD JACKSON, THE WORLD TRADING SYSTEM: L. & POL'Y INT'L ECON. RELATIONS 229 (2nd ed., MIT Press, 1997).

well as in the FTAs to ensure that the States could protect their sovereignty during a threat to their security.[9] However, the immunity granted under the security exceptions can create a loophole for the parties to these agreements and allow them an escape route from their obligations. That is the reason national security has been termed as the 'Achilles' heel of international law'.[10]

As opposed to the general exceptions which have detailed guidelines emerging out of their interpretation since the GATT days, the fundamental problem with security exception provisions is that they do not offer any concrete guidelines concerning their interpretation. The security exception enshrined in Article XXI of the GATT, 1994 was invoked in some of the GATT era disputes but never formally interpreted. Since then, the most intense focus of the debate on security exceptions' interpretation has been on its self-judging nature.[11] If the security exceptions are judged to be completely non-justiciable, they can be misused by a WTO Member by creating a gap in the legitimate global trading system. Conversely, the WTO Members have been concerned about the limited grounds provided for the invocation of these exceptions. The idea of the security exceptions has been broadened from inter-State conflict to a wide range of non-military threats and, occasionally, non-human threats including cybersecurity,[12] climate change,[13] infectious disease,[14] food restrictions,[15] etc. Thus, there has been an emergence of the new international economic order in the context of national

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[9] Stephan Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N. L. 61, 64-67, 138 (2009).

[10] Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 426 (1999) [hereinafter Hannes].

[11] Rostam J. Neuwirth & Alexandr Svetlicinii, *The Economic Sanctions over the Ukraine Conflict and the WTO: "Catch-XXI" and the Revival of the Debate on Security Exceptions*, 49(5) J. WORLD TRADE 891, 892 (2015).

[12] *See generally*, Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18(2) J. INT'L ECON L. 449 (2015).

[13] *See generally*, Felicity Deane, *The WTO, the National Security Exception and Climate Change*, 6(2) CARBON & CLIMATE L. REV. 149 (2012).

[14] *See generally*, Emmanuel Kolawole Oke, *Is the National Security Exception in the TRIPS Agreement a Realistic Option in Confronting COVID-19?*, EUR. J. INT'L L. TALK (Aug. 6, 2020), https://www.ejiltalk.org/is-the-national-security-exception-in-the-trips-agreement-a-realistic-option-in-confronting-covid-19/.

[15] Viktoriia Lapa, *GATT Article XXI as a way to justify food trade restrictions adopted as a response to COVID-19?*, REGULATING FOR GLOBALIZATION (Apr. 10, 2020), http://regulatingforglobalization.com/2020/04/10/gatt-article-xxi-as-a-way-to-justify-food-trade-restrictions-adopted-as-a-response-to-covid-19/.

security which is *unbounded by time and space, and decentered from any overriding great-power or interstate conflict.*[16]

With the Marrakesh Agreement, the language of the GATT security exceptions was also adopted in Article 73 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Article XIV *bis* of the General Agreement on Trade in Services (GATS). For instance, Article 73 "Security Exceptions" of the TRIPS Agreement stipulates as follows:

> Nothing in this Agreement shall be construed:
> (a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;
> i. relating to fissionable materials or the materials from which they are derived;
> ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> iii. taken in time of war or other emergency in international relations; or
> (c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

The phrase "which it considers" here has been the origin point of much of the controversy and uncertainty surrounding the security exceptions. Unlike the general exceptions in the WTO covered agreements, this phrase suggests a large amount of discretion lying with the WTO Members to determine the applicability of security exceptions. Further, some scholars also opined that the security exception provision is self-judging, and it exempts the Members from the obligation to furnish any information pertaining to the justification for the invocation of the exception.[17] This is why the security exceptions have long been

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[16] *See generally*, J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129(4) YALE L.J. 924 (2020) [hereinafter Heath].

[17] *See generally*, Elena Klonitskaya, *Is the WTO the Right Forum to Hear National Security Issues?*, GLOB. TRADE CUST. J. 9(11/12) 508 (2014); Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VIRGINIA J. INT'L L. 375 (2003) [hereinafter Akande & Williams]; D. Shapiro, *Be Careful What You Wish for: US Politics*

referred to as the "Pandora's Box", regarded by the diplomats as essential but a taboo.[18] It was considered that once the trend of national security exception invocation began at the WTO, it would be hard to reverse and the disciplines put in place by the WTO-covered agreements, would be sorely undermined. It may even "unwind" the entire WTO system, rendering it unviable.[19] Observing the trend of security exceptions invocation in the past few years, this apprehension was not entirely baseless.

Since 2017, Saudi Arabia, the United Arab Emirates (UAE) and Bahrain have cited it in four cases to justify their measures against Qatar,[20] the United States (US) has invoked 'national security' in more than half a dozen instances to justify steel and aluminium tariffs,[21] Russia has invoked it in its trade dispute with Ukraine,[22] and Japan has turned to it in its dispute with South Korea regarding Japanese export control measures.[23] This stands in contrast to the frequency of use of security exceptions during the GATT era and the first two decades of the WTO era. The decades between 1948 and 2017 witnessed few cases involving national security

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and the Future of the National Security Exception to the GATT, 31 GEORGE WASH. J. INT'L L. ECON. 111 (1997) [hereinafter Shapiro]; Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the US Does*, 19(2) UNIV. PENN. J. INT'L L. 276 (1998); Roger P. Alford, *The Self-Judging WTO Security Exception*, 3 UTAH L. REV. 702 (2011) [hereinafter Alford]; Heath, *supra* note 16, at 1048.

[18] Tom Miles, *Russia's WTO 'national security' victory cuts both ways for Trump*, REUTERS (Apr. 5, 2019), https://www.reuters.com/article/us-russia-ukraine-wto-ruling-idUSKCN1RH1K9 [hereinafter Miles].

[19] Stephen Kho & Thor Petersen, *Turning the Tables: The United States, China, and the WTO National Security Exception*, CHINA BUS. REV. (Aug. 16, 2019), https://www.chinabusinessreview.com/turning-the-tables-the-united-states-china-and-the-wto-national-security-exception/ [hereinafter Kho & Peterson].

[20] The security exception was raised by the three Arab countries, Saudi Arabia, the UAE and Bahrain, in WTO disputes DS526, DS527, DS528 and DS567. *See* Saudi Arabia —IPR, *supra* note 5, ¶3.3; *Qatar seeks WTO Panel review of UAE measures on goods, services, IP rights*, WTO (Oct. 23, 2017), https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm; *Bahrain invokes WTO's "national security" clause in Qatar row*, REUTERS (June 30, 2017), https://www.reuters.com/article/gulf-qatar-wto-idUSL8N1JR4AV.

[21] The exception under Article XXI of GATT was raised by the US in 9 cases: DS544, DS548, DS550, DS551, DS552, DS554, DS564, DS547 and DS556. *Panels established to review US steel and aluminium tariffs, countermeasures on US imports*, WTO (Nov. 21, 2018), https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm.

[22] Russia – Traffic in Transit, *supra* note 5, at ¶7.4.

[23] *Panels established to review Indian tech tariffs, Colombian duties on fries*, WTO (Jun. 29, 2020), https://www.wto.org/english/news_e/news20_e/dsb_29jun20_e.htm; *See* Miles, *supra* note 18.

concerns.[24] Until the invocation of the security exception by the Gulf Cooperation Council countries in 2017, *US — Helms Burton* was the only WTO dispute case involving security exception.[25] But it was settled outside the WTO when the US and the European Union (EU) reached an agreement, so the scope of the security exception was never determined.[26]

The self-imposed restraint by the GATT Contracting Parties and the WTO Members towards the 'security exceptions' was considered necessary. This was due to the debate surrounding the justiciability of the security exception. It was argued by some, such as the US, that the security exception was completely outside the jurisdiction of the WTO dispute settlement system.[27] The US, in the early years of the GATT, advocated for a narrow interpretation of the security exception. The US delegate in the GATT negotiations commented on how the security exception provisions were drafted to take care of real security interests and, at the same time, limit the exceptions so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.[28] He went on to caution that security exceptions cannot be so broad that, under the guise of security, countries put on measures which actually have a commercial purpose.[29] However, since 1985 when it invoked the exception against Nicaragua in *United States – Trade Measures affecting Nicaragua*,[30] the US has taken the position that the security exception is "self-judging".[31] The Panel was in fact specifically prohibited from examining or judging the validity of or motivation for the invocation of Article XXI(b)(iii) by the US.[32]

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[24] There were instances where a contracting party invoked it to shield blatantly protectionist measures from Panel scrutiny. However, the frequency of such cases became quite higher since 2017. *See* BRANDON J. MURRILL, CONG. RESEARCH SERV., LSB10223, THE "NATIONAL SECURITY EXCEPTION" AND THE WORLD TRADE ORGANIZATION (Nov. 28, 2018) [hereinafter Murill].

[25] *United States – The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38 (adopted Apr. 22, 1998), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm.

[26] Memorandum of Understanding concerning the US Helms-Burton Act and the US Iran and Libya Sanctions Act, Apr. 11, 1997, EU-The United States of America (USA), *reprinted in* 36 INT'L LEGAL MATERIALS 529, 529-30 (1997), 91 AM. J. INT'L L. 498 (1997); Stefaan Smis & Kim van der Borght, *The EU-US Compromise on the Helms-Burton and D'Amato Acts*, 93(1) AM. J. INT'L L. 228, 228-29 (1999).

[27] Alford, *supra* note 17, at 757.

[28] Kho & Peterson, *supra* note 19.

[29] *Id.*

[30] Panel Report, *United States – Trade Measures Affecting Nicaragua* (Nicar./U.S.), WTO Doc. L/6053, ITL 102 (adopted Oct. 13, 1986) [hereinafter US – Measures Affecting Nicaragua].

[31] Kho & Peterson, *supra* note 19.

[32] US – Measures Affecting Nicaragua, *supra* note 30, at ¶1.3.

The few disputes where the security exception was cited by a GATT Contracting Party or a WTO Member were generally solved through informal diplomatic processes, not allowing Panels any opportunity for their interpretation.[33] The issue of justiciability of the security exception was finally put before a WTO Panel in *Russia – Traffic in Transit* case. Russia had imposed a set of measures, blocking road and rail routes for Ukrainian goods for traffic in transit across Russia to Central Asian countries and Belarus.[34] Ukraine claimed that these measures were inconsistent with Article V of GATT and Russia's Accession Protocol.[35] When Ukraine challenged the measures before a WTO Panel, Russia claimed the defense of national security exceptions.[36] It refused to specifically address the factual evidence or legal arguments presented by Ukraine.[37] Instead, it put forth the argument supported by the US, that due to Russia's invocation of Article XXI of the GATT, 1994, the Panel did not have the jurisdiction to address the matter.[38]

The Panel decided to first interpret Article XXI due to Russia's challenge to its jurisdiction.[39] The Panel held that if the Member invoking the national security exception was the sole judge of the fulfillment of its requirement, then the Panel would not have the power to review the case any further. The Panel did not accept Russia's or US's arguments on complete non-justiciability of the security exception, but instead took a middle path and judged a part of the provision to be self-judging.[40] This part was further weighed by the obligation of good faith on the invoking Member.[41] The Panel observed that the adjectival clause "which it considers" in Art. XXI of GATT, 1994 only qualifies the word "necessity" and the determinants set out in subparagraphs (i)-(iii) operate as limitative qualifying clauses, thereby acting as a limitation to a Member's discretion under the chapeau.[42] It has been opined that the Members' discretion to determine what is essential for its security is limited by 'necessity' and 'proportionality' of the measure.[43]

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[33] Murrill, *supra* note 24.
[34] Russia – Traffic in Transit, *supra* note 5, at ¶7.1.
[35] *Id.* at ¶3.1.
[36] *Id.* at ¶3.2.
[37] *Id.* at ¶7.3.
[38] *Id.* at ¶¶7.4, 7.51-2.
[39] *Id.* at ¶¶7.24-5.
[40] *Id.* at ¶¶7.102-4.
[41] *Id.* at ¶7.132.
[42] *Id.* at ¶7.65.
[43] Ryan Goodman, *Norms and National Security: The WTO as a Catalyst for Enquiry*, 2 CHI. J. INT'L L. 101, 105 (2001); Hannes, *supra* note 10, at 432; Russia – Traffic in Transit, *supra* note 5, ¶¶7.101-7.102.

The Russian dispute was followed by the Panel Report in *Saudi Arabia — IPRs* dispute that came out in June 2020. It is a dispute of many *firsts* — the *first* dispute in which the security exception enshrined in Article 73 of the TRIPS Agreement was interpreted by a WTO Panel; the *first* dispute where a WTO Panel rejected the invocation of security exception; and, the *first* dispute where a non-military situation involving diplomatic and economic actions was successfully characterised as an "emergency in international relations". Another point of interest in this dispute is how the allegations of supporting terrorism and extremism by one WTO Member, i.e., Saudi Arabia against another WTO Member, i.e., Qatar were considered as evidence of the existence of an "emergency in international relations". Even from the point of view of intellectual property (IP) law, this case is of significance because the major IP treaties before the TRIPS Agreement did not have any security exception.[44]

III. SAUDI ARABIA – IPRS DISPUTE: DEBUNKING THE MYTHS

A. Background of the Saudi Arabia –IPR Dispute

In June 2017, Saudi Arabia, along with the UAE and Bahrain, imposed a scheme of diplomatic, political, and economic measures against Qatar.[45] Saudi Arabia asserted that, between November, 2014 and June, 2017, Qatar had continued to violate the terms of the Riyadh Agreements by supporting and harboring extremist individuals and organisations, and allowing terrorist and extremist groups to use Qatar-based and Qatar-sponsored media platforms to spread their messages.[46] Consequentially, it severed relations with Qatar, including diplomatic and consular relations; closed all its ports, roads and airspace for Qatari use; prevented Qatari nationals from crossing into Saudi territory; and expelled Qatari residents and visitors from Saudi territories.[47]

All these measures disrupted the trade in goods and services between Qatar and the other three countries. Such measures impacted the ability of Qatari nationals to protect their IP rights in Saudi Arabia.[48] As a result, Qatar first decided to request consultations at the WTO against the other three countries, Saudi Arabia (DS528), Bahrain (DS527) and the UAE (DS526) for "Measures Relating to Trade in Goods

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[44] Emmanuel Kolawole Oke, *COVID-19, Pandemics, and the National Security Exception in the TRIPS Agreement*, 12(3) J. INTELL. PROP. INFO. TECH. ELEC. COMM. L. 397, 397 (2017).
[45] Saudi Arabia – IPRs*, supra* note 5, at ¶2.28.
[46] *Id.* at ¶2.25.
[47] *Id.* at ¶2.29.
[48] *Id.* at ¶2.18.

and Services, and Trade-Related Aspects of Intellectual Property Rights". These consultations did not prove to be successful.[49]

Qatar then decided to go ahead against the UAE alone rather than all the three nations, requesting Panel establishment in *UAE — Goods, Services and IP rights*.[50] *Saudi Arabia —IPRs* was in fact the fourth case lodged by Qatar at the WTO due to the 2017 crisis and the first one where the Panel came out with a report.[51]

B. Facts of the Saudi Arabia – IPRs Case

As the proceedings in DS525 were moving slowly due to the large body of claims, Qatar brought a fresh complaint against Saudi Arabia. Among the measures taken by Saudi Arabia against Qatar in 2017, its government had blocked access to the website of beIN,[52] a global sports and entertainment company headquartered in Qatar having broadcasting rights for many of the major sports competitions, including the FIFA World Cup, the US Open Tennis Championship and Major League Baseball.[53]

At that time, in August 2017, an entity known as beoutQ, or "be out Qatar" began unauthorised distribution of beIN's licensed content. It illegally streamed the contents of beIN sports channel, replacing the latter's logo with its own.[54] It quoted prices in Saudi Arabian Riyals and featured advertisements for Saudi products.[55] As Saudi Arabia's measures prevented access to IPR remedies for Qatari nationals, Qatari government decided to turn to the WTO and brought a request of consultations in October of 2018. Due to the failure of consultation, a

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[49] Amna Saif Al-Naemi et al., *The Blockade Imposed Against Qatar: An Analytical Study of WTO Principles*, TRADE LAB (2018), https://www.tradelab.org/single-post/2018/10/01/the-blockade-imposed-against-qatar-an-analytical-study-of-wto-principles.

[50] Request for the Establishment of a Panel by Qatar, *United Arab Emirates – Measures relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, ¶2, WTO Doc. WT/DS526/2 (adopted Oct. 12, 2017). This dispute involved violation of Articles I, V, X, XI and XIII of GATT, Articles II, III and XVI of GATS, and Articles 3, 4, 41, 42 and 61 of the TRIPS Agreement. *See* ¶¶11, 14 and 17 [hereinafter UAE — Goods, Services and IP rights].

[51] The Panel was still working on *UAE — Goods, Services and IP rights* and hoped to come out with a report in 2021 when Qatar suspended the proceedings after the relationship with the UAE, Bahrain and Saudi Arabia began to improve. Emma Farge, *Qatar suspends WTO dispute with UAE as Gulf conflict thaws*, REUTERS (Jan. 19, 2021), https://www.reuters.com/article/trade-wto-qatar-int-idUSKBN29O1OC.

[52] Saudi Arabia – IPRs, *supra* note 5, at ¶2.36.

[53] *Id.* at ¶¶2.30-1.

[54] *Id.* at ¶2.40.

[55] *Id.* at ¶¶2.42-43.

request for the establishment of a Panel from Qatar followed. The Saudi measures at issue were:[56]

a. Saudi Arabia's acts and omissions that result in Qatari nationals being unable to protect their IPR;
b. Saudi Arabia's acts and omissions that result in failure to accord Qatari nationals treatment no less favourable than that accorded to Saudi Arabia's own nationals or nationals of other countries;
c. Saudi Arabia's acts and omissions that make it unduly difficult, for Qatari nationals to access civil judicial remedies, or to seek remedies, in respect of enforcement of IPR;
d. Saudi Arabia's omission to prosecute as criminal violation piracy on a commercial scale.

These measures were reflected specifically in Saudi government's circular stripping beIN of the right to protect its IP; anti-sympathy measures preventing Saudi lawyers from assisting Qatari citizens; travel restrictions; Saudi's failure to apply criminal procedures and penalties against beoutQ; and Saudi promotion of public gatherings with screenings of beoutQ's broadcasts.[57] These measures were claimed to be in violation of various provision of the TRIPS Agreement.[58]

C. Panel Analysis in Saudi Arabia –IPRs Case

The Panel analysed the facts, Saudi measures and Qatar's legal claims, and ended with an examination of Article 73.[59] The sub-parts below present an overview of how the Panel dealt with Saudi requests to decline to make findings, Qatar's claims under the TRIPS Agreement and Saudi invocation of the security exceptions.

1. Security exceptions under TRIPS Agreement

As Saudi Arabia had invoked the security exception in Article 73(b)(iii) of the TRIPS Agreement, the Panel had to decide upon whether the Saudi measures, responsible for TRIPS Agreement violation, constituted actions "which it

[56] *Id.* at ¶2.46.
[57] *Id.* at ¶2.47.
[58] Qatar claimed that Saudi Arabia violated Articles 3.1 (national treatment), 4 (most-favored-nation treatment), 14 (protection of broadcasting organizations), 41 (general obligations on enforcement of IPR), 42 (fair and equitable procedures) and 61 (criminal procedures) of the TRIPS Agreement. It additionally claimed that Articles 9, 11, 11bis and 11ter of the Berne Convention, as incorporated in TRIPS Agreement, were also violated; *see Id.* at ¶3.1.
[59] *Id.* at ¶¶7.5-6.

considers necessary for the protection of its essential security interests" and "are taken in time of war or other emergency in international relations".[60]

The Panel itself recognised that Article 73(b)(iii) of the TRIPS Agreement is identical to Article XXI(b)(iii) of the GATT 1994, and that the latter has been addressed in *Russia – Traffic in Transit*.[61] The Panel in *Russia – Traffic in Transit* had held that any Panel must determine for itself whether the invoking Member's actions were "taken in time of war or other emergency in international relations". It had further found that a Panel's review of whether the invoking Member's actions are ones "which it considers necessary for the protection of its essential security interests" under the chapeau of Article XXI(b) of the GATT 1994 requires:

(a) an assessment of whether the invoking Member has articulated the "essential security interests" that it considers the measures at issue are necessary to protect; and
(b) a further assessment of whether the measures are so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that the invoking Member implemented the measures for the protection of its "essential security interests" arising out of the emergency.

2. Whether the measures were "taken in time of war or other emergency in international relations"?

Saudi Arabia had severed diplomatic and consular relations with Qatar and imposed comprehensive measures putting an end to all economic and trade relations between itself and Qatar.[62] When analysing it, the Panel agreed with the view on "emergency in international relations" taken in *Russia – Traffic in Transit* as follows:

> …[T]he term "emergency in international relations" refers generally "to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state". Such situations, in the Panel's view, "give rise to particular types of interests for the Member in question, i.e., defence or military interests, or maintenance of law and public order interests". For the Panel, while "political" and "economic" conflicts could sometimes be considered "urgent" and "serious" in a political sense, such conflicts will not be "emergenc[ies] in international

[60] *Id.* at ¶7.229.
[61] *Id.* at ¶7.230.
[62] *Id.* at ¶7.258.

> relations" within the meaning of subparagraph (iii) "unless they give rise to defence and military interests, or maintenance of law and public order interests".

The Panel here shared Saudi's view that one Member's severance of "all diplomatic and economic ties" with another Member could be regarded as "the ultimate State expression of the existence of an emergency in international relations" and falls into the category of cases in which such action can be characterised as an exceptional and serious crisis in the relations between two or more States.[63]

Next, the Panel recalled the context in which Saudi Arabia's severance of relations with Qatar occurred. Saudi Arabia repeatedly alleged that Qatar had repudiated the Riyadh Agreements designed to address regional concerns of security and stability, supported terrorism and extremism, and interfered in the internal affairs of other countries.[64] The Panel did not rule on allegations themselves but opined that the nature of the allegations constitutes further evidence of the grave and serious nature of the deterioration and rupture in relations between these Members, and is also explicitly related to Saudi Arabia's security interests. The Panel found that an "emergency in international relations" exists in this case and that the measures were taken in time of an "emergency in international relations".[65]

This interpretation, allowing "emergency in international relations" to include an event not related to a military conflict or armed hostility between the parties, provides for an important addition to the limited jurisprudence on security exceptions.

3. Whether the criterion "action which it considers necessary for the protection of its essential security interests" is fulfilled?

In the second part of its two-pronged analysis of Article 73, the Panel considered whether Saudi Arabia has sufficiently *articulated* its relevant "essential security interests" and whether the anti-sympathy measures or non-application of criminal procedures or penalties are so remote from the "emergency in international relations" so as to make it *implausible* that Saudi Arabia implemented them for protection of its "essential security interests".

For the first part, Saudi Arabia expressly articulated its "essential security interests", in terms of protecting itself "from the dangers of terrorism and extremism". The interests identified by Saudi Arabia were characterised as ones

[63] *Id.* at ¶7.259.
[64] *Id.* at ¶7.263.
[65] *Id.* at ¶¶7.269-270.

that clearly relate to "the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally". The Panel recalled that this requirement is not an onerous one and is subject to limited review from a Panel.[66] Based on this standard, it concluded that Saudi Arabia's articulation of its relevant "essential security interests" is sufficient.[67]

For the next part, the Panel had to decide whether the relevant actions of Saudi Arabia passed the implausibility test or not. Both the "anti-sympathy measures" and the "non-application of criminal procedure and penalties" had to pass this test. The Panel first analysed the anti-sympathy measures which prevented beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals.[68] These measures, aimed at denying the Qatari nationals access to civil remedies, were viewed as an aspect of Saudi Arabia's umbrella policy of ending or preventing any form of interaction with Qatari nationals. Given that Saudi Arabia imposed a travel ban on all Qatari nationals and expelled all of them from Saudi Arabia as part of the comprehensive measures, it is not implausible that Saudi Arabia might take other measures to prevent Qatari nationals from having access to courts, tribunals and other institutions in Saudi Arabia.[69] Thus, the Panel declared that the anti-sympathy measures "meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e., they are not implausible as measures protective of these interests".[70]

However, the Panel had a different conclusion regarding the connection between Saudi Arabia's stated "essential security interests" and the non-application of criminal procedures and penalties to beoutQ. In contrast to the anti-sympathy measures, the application of criminal procedures or penalties to beoutQ would not have required any entity in Saudi Arabia to engage in any form of interaction with beIN or any other Qatari national.[71] The non-application of criminal procedures and penalties affected not only Qatar or Qatari nationals, but also a range of third-party right holders.[72] In fact, third-party right holders submitted evidence directly to the Saudi authorities, e.g., United States Trade Representative report on submissions made to it concerning beoutQ's piracy, and letters by the Union of European Football Associations (UEFA) and BBC Studios containing evidence on

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[66] *Id.* at ¶7.281.
[67] *Id.* at ¶¶7.280-282.
[68] *Id.* at ¶7.285.
[69] *Id.* at ¶7.286.
[70] *Id.* at ¶7.288.
[71] *Id.* at ¶7.289.
[72] *Id.* at ¶7.291.

beoutQ's operations issued to the Saudi government.[73] There was also no temporal link between the non-application of criminal procedures and Saudi Arabia's comprehensive measures against Qatar in 2017.[74] For these reasons, no rational or logical connection was found between the comprehensive measures aimed at ending interaction with Qatar and Qatari nationals, and the non-application of Saudi criminal procedures and penalties to beoutQ.[75] Consequently, the Panel held that the Saudi non-application of criminal procedures was remote and unrelated from the "emergency in international relation" and failed the implausibility test.

4. Panel's Findings

The Panel concluded that the requirements for invoking Article 73(b)(iii) are met in relation to the inconsistency with Article 42 and Article 41.1 of the TRIPS Agreement arising from the anti-sympathy measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals. The Panel also found that the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from Saudi Arabia's non-application of criminal procedures and penalties to beoutQ.[76]

D. Implications of the Saudi Arabia – IPRs Case

The case is a historic one in many ways, but the two reasons that stand out among them are: *first*, this is the first case in the combined history of GATT and WTO in which a Panel has rejected the defence of security exception; and *second*, the case widened the scope of what could constitute an emergency in international relations by accepting the termination of diplomatic, consular and economic relations by Saudi Arabia as one. These two reasons may have rather conflicting implications. While the first one is affirming the limits of security exception, the second development is assuring to those WTO Members who may wish to invoke it for situations not purely military or defence-related in nature. The two implications originating from the case are scrutinised below in greater detail.

1. First Rejection by a Panel of Security Exception

The rejection of the Saudi Arabia's invocation of a security exception had been a matter of relief not only to Qatar, but also to the WTO Members which have faced

[73] *Id.* at ¶7.290.
[74] *Id.* at ¶7.292.
[75] *Id.* at ¶7.292.
[76] *Id.* at ¶7.294.

its invocation in cases before the WTO dispute settlement. Some of these WTO Members, such as the EU and Canada, were in favour of objective determination and transposition of analytical framework from the *Russia — Traffic in Transit* case. Even Russia opined that the Panel in the present dispute cannot decline to proceed further based on the same considerations the Panel in *Russia — Traffic in Transit* applied while rejecting Russia's arguments.[77] Some of the other WTO Members, such as India and Korea, that had steel and aluminium tariffs imposed on them for the reason of "national security" became third parties in the case but did not present any arguments. In this context, these countries had concrete reasons to apprehend a possible departure from the *Russia – Traffic in Transit* interpretation of security exception. Since they have all been at the receiving end of the liberal citation of security exception by the US, an endorsement of the US's view of self-judging nature of the security exception could have affected the countries' ongoing disputes with the US.

More significantly, while the *Russia – Traffic in Transit* case had first opened up the theoretical possibility of a security exception facing the Panel's scrutiny, this possibility was realised as reality in the *Saudi Arabia – IPR* case. In fact, some may have wondered whether political sensitivity would have allowed any Panel to establish such a historic precedent. Therefore, it has set an example for Panels in other WTO cases, both ongoing and future.

Arguably, this case may allow the Pandora's box to be closed again, reversing the trend of liberal invocation of national security that has developed in the last few years. The Panel Report showed that not only the interpretation of security exception as judiciable was here to stay, but also that a WTO Panel will not hold back from rejecting invocation of security exception if the requirements under the exception are not fulfilled.

2. Added Dimension to "Emergency in International Relations"

The second important implication of the Panel Report is regarding the interpretation of "emergency in international relations" which offers support to those looking to invoke it for wider range of non-military circumstances. Unlike in the case of Russia and Ukraine, the parties in the *Saudi Arabia — IPRs* case, i.e., Qatar and Saudi Arabia, were not involved in armed hostility with each other. Instead, Saudi Arabia had severed diplomatic and economic ties with Qatar and characterised it as "the ultimate State expression of the existence of an emergency

[77] Panel Report, *Saudi Arabia — Protection of IPR*, Addendum, Annex C-9, Integrated Executive Summary of the Arguments of the Russian Federation, ¶8, WTO Doc. WT/DS567/R/Add.1 (adopted Jun. 16, 2020).

in international relations".[78] The Panel agreed with this characterisation by Saudi Arabia.[79] It noted that it is a combination of considerations which sustains this conclusion, rather than any one of them being necessarily decisive in its own right.[80] Saudi Arabia's actions were viewed by the Panel in the context of similar actions taken by other nations, such as Bahrain and the UAE, and the relevant history recounted.[81] When taken together, Saudi actions were labelled as forming a case involving "terms of an exceptional and serious crisis in the relations between two or more States".[82]

Another point of interest emerges from Saudi allegations of Qatar supporting terrorism and extremism and interfering in internal affairs of other countries. While the Panel took no position on the allegations, it considered the nature of these allegations as "evidence of the grave and serious nature of the deterioration and rupture in relations" between Qatar and Saudi Arabia.[83] In fact, it opined that "when a group of States repeatedly accuses another of supporting terrorism and extremism that in and itself reflects and contributes to a situation of heightened tension or crisis" between them.[84] This means that even in a case where non-military situations or actions have to be characterised as constituting an "emergency in international relations", those situations or actions do not have to be as extreme as termination of all diplomatic ties. Even allegations of one WTO Member supporting terrorism and extremism can form evidence of deterioration of international relations and a situation of heightened tension or crisis. They may form only one of the considerations in determining the existence of "emergency in international relations" in such a case though.

Consequently, this case opens the door for the possibility of situations less severe than latent military conflict (as between Russia and Ukraine) and total severance of diplomatic relations (as in Saudi Arabia's case) to be characterised as an "emergency in international relations".

IV. DISSIMILATION OF THE SECURITY EXCEPTIONS PROVISIONS IN THE FREE TRADE AGREEMENT

The security exceptions are not limited to the WTO agreements but are also provided in a majority of the FTAs, in one form or the other. In terms of the

[78] Saudi Arabia — IPRs, *supra* note 5, at ¶7.232.
[79] *Id.* at ¶7.259.
[80] *Id.* at ¶7.257.
[81] *Id.* at ¶7.262.
[82] *Id.* at ¶7.262.
[83] *Id.* at ¶7.263.
[84] *Id.* at ¶7.263.

nature, characteristics and grounds, the security exception provisions in the FTAs have diversified to a large extent, and diverged from the security exceptions in the WTO agreements. Some provisions in the FTAs may be similar to the security exception provisions in the GATT, GATS or the TRIPS Agreement, or they may directly incorporate them from these agreements. In the exceptions that have diverged, some of them have kept similar structure but added new grounds, while others have formulated completely new language. Then, there are some FTAs which do not contain security exceptions at all.[85]

The Indian FTAs exhibit all these trends. Sometimes the diverse trends are displayed in a single FTA, with incorporation of the WTO security provisions in one chapter and modification of the WTO language in another chapter. This part will examine the variety of trends in security exception provisions in the FTAs around the world and analyse where the security exceptions in the Indian FTAs fit in.

A. Approaches towards Security Exceptions Provisions in FTAs

The diversity in approaches towards security exceptions emerges from one main reason, namely, the need felt by some nations to settle the matter of their justiciability. As noted above, the security exception provisions in the WTO agreements follow a closed list approach and, as confirmed in the Panel Reports in *Russia – Traffic in Transit* and *Saudi Arabia – IPRs*, limit the ability of the WTO Members to invoke security exceptions.[86] So, even before the rulings in these cases, some nations were concerned about the possible limitation placed on their security policy space. In their FTAs, they sought to strengthen their policy space vis-à-vis national security. They introduced innovations in terms of grounds listed or clarifying the justiciability of the exceptions. Inspirations were taken from the investment treaties too when introducing these innovations.

One such case is when the US, after its invocation of security exception against Nicaragua, realised the uncertainty regarding the justiciability of security exceptions. In response, it adopted an open list approach to security exceptions in order to provide wider grounds for the invocation of security exceptions.[87] For instance, the Article X of the US-Bangladesh Bilateral Investment Treaty (BIT) signed in 1986 contained a wider and open-ended security exception as follows:

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[85] *See generally*, George-Dian Balan, *On Fissionable Cows and the Limits to the WTO Security Exceptions*, 14(1) GLOB. TRADE CUST. J. 2 (2014).
[86] *Id.* at 3.
[87] *Id.* at 3.

> This Treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[88]

As opposed to the three grounds viz. "fissionable materials", "supply to military establishment", and "emergency in international relations" which limit the scope of "protection of its own essential security interest" contained in Article XXI of the GATT, 1994, Article X of the US-Bangladesh BIT does not contain any such grounds to limit the scope of the phrase. Further, the scope of "the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security" is not limited to the obligations contained in the UN Charter as it is in the case of the WTO agreements. Other FTAs provide additional grounds for "protection of security interest" such as those related to (i) *production of or trade in* arms, munitions and *war materials*;[89] (ii) *economic activities* carried out directly or indirectly for the purpose of provisioning a military establishment;[90] and (iii) protection of *critical public infrastructure* from deliberate attempts to disable or disrupt it,[91] etc. These modifications seek to increase the scope of the security exceptions from the narrow grounds provided in the WTO.

The approach of the FTAs towards the security exceptions will be classified into three categories for the purpose of analysis:

(i) Where the security exception provisions from the GATT, GATS and TRIPS Agreement are incorporated by reference or are reproduced with no or inconsequential modifications;

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[88] *See* Treaty concerning the Reciprocal Encouragement and Protection of Investment, Bangl.-U.S., art. X, Mar. 12, 1986, S. Treaty Doc. No. 99-23, 99th Cong. 2nd Sess.; *See also* Treaty concerning the Treatment and Protection of Investment, Pan.-U.S., art. X, Oct. 27, 1982, S. Treaty Doc. No. 99-14, 99th Cong. 2nd Sess.; Treaty concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Zaire, art. X, Aug. 3, 1984, S. Treaty Doc. No. 99-17, 99th Cong. 2nd Sess.; Treaty concerning the Encouragement and Reciprocal Protection of Investment, Kyrg.-U.S., art. X, Jan. 19, 1993, S. Treaty Doc. No. 103-13, 103rd Cong. 1st Sess.; Treaty concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S., art. XVIII, Feb. 19, 2008, S. Treaty Doc. No. 110-23, 110th Cong. 2nd Sess.; Free Trade Agreement (FTA), S. Kor.-U.S., art. 23.2, Jun. 30, 2007; FTA, Bahr.-U.S., art. 20.2, Sep. 14, 2004.

[89] Comprehensive and Enhanced Partnership Agreement (CEPA), Arm.-EU, art. 202, 1996.

[90] Association Agreement, EU-Ukr., art. 143(1)(b)(ii), 2014.

[91] FTA, EU-Sing., art. 16.11(b)(iv), 2018.

(ii) Where the security exceptions from the GATT, GATS and TRIPS Agreement are reproduced with modifications; and
(iii) Where new language and structure for security exceptions is used.

Concerning the *first* type of approach, many FTAs in India as well as around the world adopt the language of security exceptions in WTO agreements, either through incorporation by reference or by reproduction of the same or similar language in the FTAs. The latter trend, i.e., reproduction of the entire GATT or GATS language without any modifications, is not found in Indian FTAs. If the parties of an FTA want to continue with the WTO language, they prefer to incorporate the relevant provisions from the WTO Agreements by reference. India-Singapore Comprehensive Economic Cooperation Agreement (CECA),[92] the China-Australia FTA,[93] and the China-Korea FTA[94] are examples of incorporation by reference trend.

Sometimes contrasting approaches to security exceptions can also be found in the same FTA. For example, the India-Korea Comprehensive Economic Partnership Agreement (CEPA) directly incorporates Article XXI of the GATT in "Trade in Goods" chapter but reproduces the language of Article XIV *bis* with modifications in "Trade in Services" chapter.[95] For instance, Article 16.5 of the CEPA covers grounds such as measures relating to the protection of critical infrastructure which is absent in the case of Article XIV *bis* GATS.[96]

Most of these FTAs incorporate or reproduce only the GATT and GATS security exceptions. Only rarely is Article 73 in the TRIPS Agreement directly incorporated or a security exception reproduced in the IPR chapter. The India-Japan CEPA is a rare example where there is direct incorporation of Article 73 of the TRIPS Agreement.[97] Therefore, as opposed to incorporation by reference, reproduction of text contains certain modifications which are not there in the GATS text.

Concerning the *second* type of FTAs, there are multiple variations in the security provisions in some FTAs. A glance at these approaches indicates the scale of diverse and innovative variations in the text of security exceptions provisions adopted by the parties in different FTAs. For instance, the EU-Iraq Partnership

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[92] Comprehensive Economic Cooperation Agreement (CECA), India-Sing., art. 2.13, 2005 [hereinafter India-Singapore CECA].
[93] FTA, Austl.-China, art. 16.3, 2015.
[94] FTA, China-S Kor., art. 21.2, 2014.
[95] CEPA, India-S Kor., art. 2.9, 2009 [hereinafter India-Korea CEPA].
[96] *Id.* at art. 16.15(1)(b)(iv).
[97] CEPA, India-Japan, art. 109, 2010. It makes reference to Article 73 of the TRIPS Agreement.

and Cooperation Agreement contains specific exceptions related to "*government procurement indispensable for national security or for national defence purposes*".[98] Further, the EU-Israel Association Agreement contains additional grounds concerning security exceptions viz. (i) measures related to research, development or production indispensable for defence purposes; or (ii) measures in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war.[99]

Unlike other FTAs which contain security exception that applies throughout the FTA, the Australia-Hong Kong FTA divides security exception provisions into two parts and each part contains exceptions that apply to specific chapters of the FTA. To elaborate, the first part provides exceptions to chapters like Customs Procedure, Rules of Origin, Trade in Goods, etc. and it also contains additional grounds of exception for measures related to the *protection critical public infrastructure* including communications, power, transport and water infrastructure.[100] It also provides an exception for measures taken in times of *national emergency*.[101] The second part, on the other hand, provides exceptions that apply to Chapters on Telecommunication, Cross-Border Trade in Services, Electronic Commerce, etc.[102] Additionally, the second part also does not provide the grounds that fall within the scope of "essential security interest".[103]

The Canada-Ukraine FTA provides unique exceptions for measures relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices.[104] Additionally, it also provides a security exceptions provision that applies specifically to the Government Procurement chapter.[105]

In case of India, if the WTO security exceptions are reproduced, then there are always some important and consequential modifications, even if most of the language from the WTO Agreements is retained. One way of modification that India prefers is to introduce an additional ground related to 'critical infrastructure'. For example, the following ground has been introduced in the India-Mauritius CECPA:

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[98] *See* Partnership and Cooperation Agreement, EU-Iraq, art. 30(b)(iv), 2012.
[99] Euro-Mediterranean Agreement, European Communities-Israel, art. 76(c), 1995.
[100] FTA, Austl.-H.K., art. 19.4(1)(iii), 2019.
[101] *Id.* art. 19.4(1)(iv).
[102] *Id.* art. 19.4(2).
[103] *Id.* art. 19.4(2).
[104] FTA, Can.-Ukr., art. 18.3, 2016.
[105] *Id.* art. 10.4.

> (iv) relating to protection of critical public infrastructure, including communications, power and water infrastructure from deliberate attempts intended to disable or degrade such infrastructure;

A more limited variation of this ground is found in the India-ASEAN Trade in Goods Agreement, as given below:

> (iii) action taken so as to protect critical communications infrastructures from deliberate attempts intended to disable or degrade such infrastructure;

Both these grounds provide an additional criterion for India for which security exceptions can be invoked. But they do arguably have an angle of 'security'. They may also address an important security concern not addressed by the WTO security exceptions: protection of digital infrastructure. India's ban on TikTok and other Chinese apps in the aftermath of Doklam clash was, among other reasons, motivated by the concerns regarding the data security of the Indian users of these apps and its impact on the national security of India.[106] The Chinese considered the move to be in violation of the WTO obligations of India and there was a debate on whether India can invoke national security exceptions to defend itself.[107] If a ground such as protection of critical infrastructure was available at the WTO, India could defend its measures with much more certainty.

Apart from variations in terms of grounds for invoking exceptions, certain FTAs contain provisions concerning the justiciability of the security exception. Indian FTAs have also observed these trends occasionally. The plain reading of the text "which it considers" in Article XXI, GATT, Article XIV *bis*, GATS, and Article 73, TRIPS Agreement implies that it is up to each WTO Member to decide which interests are its essential security interests. It has been opined that these actions are

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[106] *Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order*, PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA (Jun. 29, 2020), https://pib.gov.in/PressReleseDetailm.aspx?PRID=1635206.

[107] *China says Indian ban on apps violates WTO rules*, REUTERS (Jan. 27, 2021), https://www.reuters.com/article/india-china-bans-idUSKBN29W0TV; Himanshu Singh Rajpurohit & Tilak Dangi, *Is India's Ban on TikTok and Other Apps Justified by the WTO Security Exception?*, REGULATING FOR GLOBALIZATION (Oct. 27, 2020), http://regulatingforglobalization.com/2020/10/27/is-indias-ban-on-tiktok-and-other-apps-justified-by-the-wto-national-security-exception/; Alexander R. Kerr Alvarez, *Dancing into Conflict: TikTok, National Security and WTO*, EDINBURGH STUDENT L. REV. (Apr. 12, 2021), https://www.eslr.ed.ac.uk/2021/04/12/dancing-into-conflict-tiktok-national-security-and-the-wto/; Vani Kaushik, *Does the Ban on Chinese Application fall under Art.XXI of GATT?*, INDIAN J. INT'L ECON. L. BLOG (Jul. 18, 2020), https://ijiel.in/blog/f/does-the-ban-on-chinese-applications-fall-under-artxxi-of-gatt.

intrinsically political in nature and can only be assessed properly by the Member in question.[108]

Nevertheless, the WTO panels have adjudicated the innovation of security exception provisions implying the justiciability of such provisions.[109] It has been the view that the Parties may assert their autonomy through the inclusion of the provisions concerning non-justiciability of the security exception provision. For instance, certain FTAs like the India-Malaysia CECA,[110] the India-Singapore CECA[111] and the India-Korea CEPA[112] contain specific provisions making the measures falling within the scope of security exception as non-justiciable *specifically for the investment-related disputes*.

Further, certain FTAs like the US – Columbia Trade Promotion Agreement and the US – Peru Trade Promotion Agreement specifically include *general exceptions* in the provision governing the scope of dispute settlement, hence, making the security exception provisions non-justiciable.[113] Similarly, some of the Indian FTA also contains specific provisions for the non-justiciability of the security exceptions but only for investment provisions. It is also crucial to note that the security exception provision in the 1997 text of the Canada-Israel FTA did not contain the term "it considers" in the phrase "prevent either Party from taking any actions necessary for the protection of its essential security interests".[114] However, in 2019 modernised FTA, the provision was modified to "prevent a Party from taking any action that *it considers* necessary to protect its essential security interests".[115]

Until few years ago, despite the important role played by the security exception provisions, certain FTAs did not contain such provisions. For instance, the India-Chile Preferential Trade Agreement (PTA)[116] and the India-Bhutan Trade Agreement[117] do not contain any security exception. In such cases, the FTAs are usually of the earlier generation and quite limited in ambition. Resultantly, a security exception may not be considered a necessity to safeguard policy space

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[108] Akande & Williams, *supra* note 17, at 375-378; Shapiro, *supra* note 17, at 111.
[109] Russia – Traffic in Transit, *supra* note 5, at ¶7.102; Saudi Arabia – IPRs, *supra* note 5, at ¶¶7.9, 7.23.
[110] *See* CECA, India-Malay., annex. 12-2, 2010.
[111] India-Singapore CECA, *supra* note 92, art. 6.12.
[112] India-Korea CEPA, *supra* note 95, annex. 10-C.
[113] Trade Promotion Agreement, Peru-U.S., art. 21.2(1)(c), 2006; Trade Promotion Agreement, Colom.-U.S., art. 21.2(1), 2012.
[114] FTA, Can.-Isr., art. 10.2(b), 1996.
[115] FTA, Can.-Isr., art. 20.2(b), 2019.
[116] *See* Preferential Trade Agreement, India-Chile, 2005.
[117] Agreement on Trade, Cooperation and Transit, India-Bhutan, 2016.

related to national security. With the proliferation of the FTAs which are majorly aimed at diversification of trade at bilateral level or among economic blocks, such changing language of the security exception provisions in the FTAs would be cardinal for the future trading regime.

B. Implications of the WTO Disputes' Interpretation on Indian FTAs

The impact of the two cases will likely prove to be significant and long-lasting on the WTO system, but their effect on the FTAs will not be straightforward to discern. *First*, the WTO interpretation in the Panel Reports or the Appellate Body Reports is not binding even on other cases. Additionally, in case of the FTAs, there is no direct or indirect obligation to be consistent with or take note of the WTO jurisprudence. As such, any *ad hoc* tribunals, panels or committees set up for dispute settlement under the FTAs may completely disregard these two Panel Reports. Lastly, some of the FTAs bear a completely different security exception language from the WTO agreements. In these cases, there cannot be any effect of the Panel Reports on any of the cases involving security exceptions.

Despite this, many Indian FTAs incorporate or reproduce directly from WTO agreements. So, any invocation of such security exceptions under these FTAs is likely to be influenced by the interpretation in Panel Reports; few FTA panels would completely disregard the Panel Reports in such cases. The arguments of the parties to the FTAs are likely to refer to the WTO cases. Even in cases involving modification of WTO security exceptions, where a new ground has been added with reference to "essential security interests", the structure is likely to remain same and the sub-paragraphs will still be judicable.

In the case of the India-ASEAN Trade in Goods Agreement and Trade in Services Agreement also the Panel Reports are not likely to have notable effect as the list of grounds has been made non-exhaustive and inclusive. As a result, even if the circumstances of invocation of security exception do not fit the listed grounds, a party to either of the agreements may still justify their invocation. However, the obligation to observe 'good faith' may still be applicable to the parties.

As observed previously, considering that the Indian FTAs only limit the justiciability of the security exceptions in case of investment, there is no clear exclusion of security exceptions from being subject to dispute settlement in the case of chapters on goods and services. So, there is no clear exclusion of security exceptions from being subject to dispute settlement in the case of chapters on goods and services. The Panel Reports may prompt India to take a more definitive stand on whether the security exceptions will be justiciable or not.

V. CONCLUSION

The new generation FTAs since the establishment of the WTO have brought tremendous alterations in the framework within which the global trade regime exists. This can also be observed from the dynamics of the security exception provisions in the FTAs. The new Panel Reports and the ongoing WTO disputes involving the security exceptions will only add to the innovations in this framework.

The centre of the discourse concerning security exception was the role of adjudication emerging out of the self-judging nature of the security exception provisions. With respect to the international trade dispute settlement mechanisms, the idea advocated by some WTO Members was that the exceptions serving as valves for political tensions can have consequences on the sovereignty of a country and thus, cannot be subject to compulsory adjudication even if economic consequences are involved. Despite the vagueness in the text of security exception provisions in the WTO agreements, the WTO Panels in *Russia – Traffic in Transit* as well as *Saudi Arabia – IPRs* have ensured certain degree of discretion to a Member to take decision concerning its security matters, and has further ensured that the expansive interpretation does not prejudice the trading interest of other Members by declaring security exceptions provision as not self-judging. But at the same time, effective control has been put in place for the objective determination of such certain situations to safeguard the trading interests of WTO Members. This keeps the WTO agreements alive while also giving deference to the sovereignty of the Members.

With increasing globalisation and the resultant spaghetti bowl effect for increased market access, the security exception provisions in the FTAs have taken divergent forms. Some FTAs created additional grounds for the invocation of security exceptions, and others made security exception provisions non-justiciable, even before this issue arose before the WTO Dispute Settlement Body (DSB). But there are some FTAs that have deferred to the WTO language completely. With these FTAs existing within the global trade law framework spearheaded by the WTO, the decision of the WTO DSB in these disputes will have a lasting impact in securing a stable trading landscape, whether a direct connection with the WTO has been provided for or not. WTO Members, including India, may very well react to the Panel Reports by more explicitly addressing the issue of justiciability in the future security exception provisions in their FTAs.